FOR ARGUMENT

23

No. 93-377

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK; JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS. INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONERS

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In Point I we will discuss some matters presented by the Solicitor General, while in Point II we will deal with issues presented by the respondents.

POINT I

A.

Of course we agree with the Solicitor General (Br Point I) that this Court's decisions in *Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463 (1976), *Washington v Confederated Tribes of Colville Indian Reservation*, 447 US 134 (1980), *California State Board of Equalization v Chemehuevi Indian Tribe*, 474 US 9 (1985), and *Oklahoma Tax Comm'n v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505 (1991), establish the right of States, notwithstanding the Indian Trader statutes, to impose certain minimal burdens on a reservation retailer's cigarette supplier, including the obligation to collect from the retailer the State tax due on cigarettes which will be sold by the retailer to non-Indians and the obligation to maintain records of its tax exempt sales to retailers. We agree, as well, that the treaties between the United States and the New York Indian Tribes do not act to prevent New York from taxing cigarette sales by Reservation retailers to non-Indians (Br, pp 21-24).[1] However, in arguing in Point II of his brief that the State's tax scheme is invalid "because it directly regulates and substantially burdens the distribution and sale of cigarettes to Indians" (Br, p 24), the Solicitor General has improperly injected new matter into this case which was neither argued by the parties nor decided by the Court of Appeals, and which is not fairly included within the question set forth in the petition for certiorari. Accordingly, the Court should decline to consider the arguments raised at Point II of the Solicitor General's brief.

[1]This argument was not raised by respondents and was neither briefed nor argued before the New York Court of Appeals. The Solicitor General's arguments were directed towards arguments made by the (Footnote continued on next page.)

As delineated by the question set forth in the petition for certiorari, the sole issue presented in this case is whether the State of New York may require wholesale Indian traders to comply with regulations limiting the quantity of tax exempt cigarettes which they may sell to their Indian customers and imposing upon them minimal burdens relating to record keeping and reporting. The question of whether the regulations unduly burden Indian retailers and Indian purchasers of cigarettes, as argued by the Solicitor General in Point II of his brief, was not raised by the respondents in the New York courts and is simply not a part of the case. Indeed, in its alternative holding, the Court of Appeals explicitly ruled that the subject regulations were improper *not* because of their impact upon Indian Tribes or Indian retailers, but because they imposed significant burdens "on the wholesaler" (A 11).[2]

(Footnote continued.)
Seneca Nation of Indians in an *amicus* brief filed in opposition to petitioners' petition for certiorari. The Seneca Nation has raised the same arguments in an *amicus* brief filed on the merits. Although we agree with the Solicitor General that the treaties do not prevent the State from taxing purchases of cigarettes by non-Indians, the issue is not properly before the Court and should not, therefore, be considered. Supreme Court Rules, Rule 14.1(a).

[2]Parenthetical references preceded by the letter "A" are to pages of the Appendix to the Printed Petition for Certiorari.

This Court's rules make clear that its grant of certiorari is limited to the questions set forth in the petition. Rule 14.1(a).[3] There exists no good reason why the Court should depart from its normal procedure to reach the issues raised in Point II of the Solicitor General's brief, which were neither presented, briefed, nor argued by the parties, and which are not fairly included within the question presented. *See, Holland v Illinois*, 493 US 474, 487 n 3 (1990). And this is particularly so since no Indian Tribe or retailer is a party to this litigation and there has been no evidence presented on the issue of whether the requirements of the regulations unduly burden Indian Tribes or retailers or are not reasonably necessary as a means of preventing fraudulent transactions. *Cf. Colville*, 447 US at 160. Without such a factual predicate, any determination with regard to the issues raised by the Solicitor General in Point II of his brief would be premature.

B.

In any event, the Solicitor General's characterization of the regulations is not sound. He asserts initially that the dealer registration requirements of the New York regulations (20 NYCRR 335.6[f][1]) are the equivalent of "a state licensing requirement for cigarette vendors" (Br, p 27). That is incorrect. The fact that the State requires sellers of cigarettes to register with the Department of Taxation and Finance before being permitted to sell unstamped cigarettes does not mean that the State is licensing vendors or precluding them from making tax exempt sales to their Indian customers.

[3]Rule 14.1(a) provides as relevant "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court".

The requirement that dealers must register with the Department of Taxation and Finance in order to be eligible to purchase unstamped cigarettes is a simple expedient designed to assure that unstamped cigarettes will be sold only to actual vendors. The requirement is intended to prevent fraud and provides the State with a simple means of tracking unstamped cigarettes, since only retailers who have registered with the Department of Taxation and Finance will be issued Tax Exemption Coupons permitting them to purchase unstamped cigarettes. Registration is virtually automatic and requires no more than that the vendor make an application to Department of Taxation and Finance. 20 NYCRR 335.6(f)(1). No fee is required. 20 NYCRR 335.6(f)(2). Finally, even if a dealer has not registered with the Department of Taxation and Finance, and does not possess unstamped cigarettes, he or she may still make legitimate tax exempt sales to their Indian customers, since under section 476 of the New York Tax Law the dealer would be entitled to a refund for any cigarette taxes which he or she had paid in error.

The Solicitor General is wrong as well in asserting (Br, pp 28-30) that the State's cigarette tax regulations conflict with the Indian Trader statutes because they place substantial burdens on the distribution and sale of cigarettes to Indians. The State's regulations are designed to segregate legitimate Indian demand for cigarettes from non-Indian demand. They seek to accomplish this in the first instance by inviting exempt Indian Nations or Tribes themselves to agree to "regulate, license, or control the sale and distribution" of untaxed cigarettes within their Reservations (20 NYCRR

335.7[c][1]), and to submit to the Department of Taxation and Finance evidence "relating to the average consumption of qualified Indian consumers on and near [their] reservation[s]". 20 NYCRR 335.7(d)(2)(i).[4]

In the absence of an agreement, the Department of Taxation and Finance will itself calculate probable demand based upon the New York average cigarette consumption per capita, multiplied by the number of enrolled members of the affected Nation or Tribe. 20 NYCRR 335.7(d)(2)(ii). As demonstrated in the affidavit of Jamie Woodward, made in opposition to respondents' motion for summary judgment in the New York Supreme Court, this formula results in a very generous allotment of tax exempt product (*see*, Record on Appeal, pp 244-245).[5] However, the regulations are intended to be descriptive of demand, not prescriptive, and the Tribes and retailers are free at any time to submit evidence

[4]The regulations define "exempt Indian nation or tribe" to include every Indian Nation or Tribe recognized by New York State. 20 NYCRR 335.6(b)(2). These include: Cayuga, Oneida Indian Nation, Onondaga Nation of Indians, Poospatuck, St. Regis Mohawk, Seneca Nation of Indians, Shinnecock, Tonawanda Band of Senecas and Tuscarora Nation of Indians. The requirement that they hold a valid exempt organization certificate in order to purchase unstamped cigarettes (20 NYCRR 335.6[d][1][i]) is a mere formality and does not, as argued by the Solicitor General (Br, p 28 n 19), impinge upon tribal sovereignty.

[5]Mr. Woodward's description of the process was provided for informational purposes only. As we have noted previously herein, *supra*, pp 3-4, the issue of whether the regulations conflict with the Indian Trader statutes because they place substantial burdens on the distribution and sale of cigarettes to Indians was neither presented, briefed, nor argued by the parties in the courts below.

relating to consumption by Indian consumers.[6] Moreover, if a retailer does not possess sufficient unstamped cigarettes to meet the demand of his or her Indian consumers, the retailer can meet the demand by selling stamped product at the tax exempt price and then obtaining a refund under Tax Law § 476. Quite contrary to the assertions of the Solicitor General, we submit that these measures are quite reasonable as a means of segregating taxable from untaxable transactions. And this is especially so given this Court's teaching in *Potawatomi* that Tribal sellers of cigarettes have a legal obligation to assist in the collection of validly imposed State sales taxes on their sales of cigarettes to non-Tribal members. 498 US at 512. Consequently, the regulations do not violate the Indian Trader statutes.

POINT II

Respondents' objection (Br, p 40) to the regulations' requirement that wholesalers obtain prior approval for each sale and delivery of unstamped cigarettes to a Reservation retailer, an objection which was also raised by the Solicitor General (Br, p 28), is not well taken. As explained in Notice N-88-53 (Joint App pp 44a-50a), the regulations' pre-approval requirements (20 NYCRR 335.7[c] and [d]) are intended to be satisfied by the Tax Exemption Coupons which will be sent each month to registered Reservation dealers.

[6]20 NYCRR 335.7(d)(2)(i), which provides that in determining probable demand the Department of Taxation and Finance will "consult" with those Indian Nations and Tribes which regulate the sale and distribution of cigarettes within their Reservations, in no way precludes those Nations and Tribes which do not regulate the sale and distribution of cigarettes within their Reservations from submitting evidence to the Department of Taxation and Finance concerning the consumption of cigarettes by Indians within their Reservations.

Since the coupons are sent to the dealer in advance of the sale, based upon the dealer's needs, pre-approval of the sale by the Department of Taxation and Finance takes place automatically. Thus, no burden is placed upon the wholesaler and no violation of federal law occurs.

Nor are respondents correct in arguing (Br, pp 40-42) that the State's regulations impermissibly encroach upon the Commissioner of Indian Affairs' power to regulate the quantity of goods which Indian traders may sell to Indians by (1) calculating the probable demand of qualified Indian consumers on each Reservation, (2) calculating such demand for each "trade territory" within each Reservation and (3) requiring the payment of tax on any sales of cigarettes in excess of the calculated amount. As we have described previously, *supra* pp 5-7, the State's regulatory scheme is designed to segregate legitimate Indian demand for cigarettes from non-Indian demand. The regulations do so reasonably by seeking first to involve the Indian Tribes and retailers in the decision-making process and, in the absence of such involvement, by employing a formula which results in a generous allotment of tax exempt product to each Reservation. Since the regulations are designed to reflect legitimate Indian demand, and impose a tax only with respect to those cigarettes intended for sale to non-Indians, they do not, as argued by respondents, infringe upon the Commissioner's power to regulate the quantity of goods Indian traders may sell to Indians and are not preempted.

The respondents' further objections (Br, pp 43-44) that the State's regulations require them to obtain a license in order to sell cigarettes to Indians on reservations, and limit to whom they may sell, are similarly incorrect. If respond-

ents' sales were made *only* to Reservation Indians, and *only* for Indian consumption, there would be no requirement that they obtain a license from the State in order to sell cigarettes at wholesale. But it is undisputed that a portion of the cigarettes sold by respondents are resold to non-Indians.

This Court's decisions in *Moe*, *Colville* and *Potawatomi* make clear that sales of cigarettes to non-Indians by Reservation retailers fall outside the purview of the Indian Trader statutes and subject the retailers and their suppliers to reasonable regulation by the State, including damage actions against Tribal officers and assessments against their suppliers. *See*, *Potawatomi*, 498 US at 514. To the extent, therefore, that respondents' sales of cigarettes are ultimately destined for resale to non-Indians, we submit that respondents are subject to the full range of the State's enforcement mechanisms. This includes the requirement that they obtain a license from the State in order to sell their products at wholesale.

Moreover, the regulations do not, as implied by the plaintiffs (Br, p 43), mandate that *every* supplier of cigarettes to Indians be licensed by the State as a cigarette agent before they may sell tax free products to Indians.[7] Under the State's regulations unlicensed out-of-State suppliers may lawfully make tax exempt sales to Indian Tribes and retailers provided only that in effecting deliveries within New York they employ common or contract carriers, who, along with licensed cigarette agents, are permitted by statute to possess unstamped product within New York (New York Tax Law § 1814[g]). It is only if the suppliers wish to possess or

[7]To the extent that Notice N-88-53 appears to so state (JA 44a), the notice, which does not have the force or effect of a regulation, is in error.

transport the cigarettes within the State themselves that they would need to be licensed.

Furthermore, the State's regulations in no way limit to whom respondents may sell. Respondents are free to sell cigarettes to whomever they wish, including unregistered Reservation dealers. There are no criminal sanctions for their doing so. However, if respondents do sell cigarettes to unregistered dealers, they face the risk that they will be held responsible for any taxes which are not collected by the dealers on their sales to non-Indians. Respondents can protect themselves against this possibility by selling to registered dealers and obtaining and forwarding to the Department of Taxation and Finance a copy of the dealers' Tax Exemption Coupon. But they are not obligated by the regulations to do so; the choice is theirs.

Finally, respondents' argument (Br, pp 42-43) that the regulations are preempted because they require the tax to be included as a part of the price of those cigarettes intended for sale to non-Indians, fails because the sale of cigarettes to non-Indians by Reservation retailers lies outside the purview of the Indian Trader statutes. As we demonstrate in our principal brief (pp 25-26), the validity of such a precollection requirement with respect to a retailer's sale of cigarettes to non-Indians has long been recognized by this Court. *See*, *Moe*, 425 US at 483 (precollection requirement of Montana law held to be not a "tax" on Indians and thus not preempted). Of course, respondents' sales of cigarettes intended for Indian consumption are tax exempt.

CONCLUSION

For the reasons stated here and in petitioners' principal brief, the order of the Court of Appeals should be reversed.

Dated: Albany, New York
February 14, 1994

Respectfully submitted,

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